Mexico – Definitive Anti-Dumping Measures on Rice and Beef
(Complaint with Respect to Rice)
WT/DS295

Opening Statement of the United States
Second Meeting of the Panel

August 3, 2004

1. Mr. Chairman, members of the Panel, the United States appreciates this opportunity to appear before you today to provide further views on the reasons why Mexico's antidumping (AD) measure on U.S. long-grain white rice, and certain provisions of its Foreign Trade Act (FTA) and its Federal Code of Civil Procedure (FCCP), are inconsistent with WTO rules. Our previous submissions and statements have addressed most of the arguments that Mexico has made in response to our claims. In this statement, we will concentrate on those points that Mexico made for the first time – or chose to re-emphasize – in its second written submission. We will also be pleased to elaborate on any of these topics, or to address any other issues that may be of interest to the Panel.

A. Mexico's Use of a Stale POI Breached Articles 1, 3.1, 3.2, 3.4, and 3.5 of the AD Agreement, and Articles VI:2 and 6(a) of the GATT 1994

2. Mr. Chairman, the first issue I would like to address pertains to Mexico's decision to base its dumping, injury, and causation analyses on a data set that ended fifteen months prior to the initiation of the investigation.

3. In our previous submissions and statements, the United States has pointed to numerous provisions in the AD Agreement and the GATT 1994 that illustrate the need for authorities to base their injury investigations on a period that includes the most recent available information. The panel report in *United States – Lumber Injury* also supports this conclusion.

4. To be specific, the *Lumber Injury* panel stated that it must be clear from an authority's determination of threat of material injury that the authority has evaluated "how the future will be

different from the immediate past, such that the situation of no present material injury will change in the imminent future to a situation of material injury . . . ."[1] An authority that fails to examine data that includes the most recent available information will not be in a position to make judgments about the immediate past. The same can be said about findings of present injury. As we have stated in our previous submissions and statements, an authority will only be in a position to make objective determinations about the present, or the imminent future, if it is examining a period that includes the most recent available information.

5. Prior to its second submission, Mexico had argued that the AD Agreement contains no obligations with respect to the age of the information that an authority may use in reaching its findings of dumping and injury. In its second submission, however, Mexico says it would be "preposterous" for a Member to base its findings on information that is ten years old (para. 21). Thus, Mexico apparently now concedes that an authority's discretion in setting a POI is not without limit. According to Mexico's second submission, the appropriateness of a particular POI will depend on the facts of a particular case (para. 22). On this point, the United States and Mexico apparently agree.

6. For example, we noted in our statement at the first Panel meeting that the panel in the *Guatemala – Cement* dispute determined that Guatemala was justified in using a particular POI because Guatemala was able to point to evidence on the record of the investigation that supported its action. By contrast, Mexico has pointed to nothing in the record of the rice investigation to justify its decision to ignore 15 months worth of recent data, or its decision not to collect any additional injury data after the initiation of the investigation. Although Mexico baldly asserts in its second submission that the POI in the rice investigation yielded objective information on dumping and injury (para. 22), it has provided no evidence in support of its claim.

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1 Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted April 26, 2004, para. 7.58 (emphasis added).

7. Finally, Mexico insists in its second submission that it did not "select" the POI that it used for its determinations (para. 35). Allow me to clarify. To be completely precise, the petitioner selected the POI. Economía simply accepted the petitioner's selection, even though the foreign exporters and producers objected.[2]

B. Economía Breached Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement by Limiting Its Examination of Injury to Only Six Months of 1997, 1998, and 1999

8. I will turn now to discuss Mexico's decision to limit its examination of injury to only six months of 1997, 1998, and 1999.

9. Mr. Chairman, an authority conducting an analysis of injury and causation must conduct an objective examination, and it must base its determinations on positive evidence. We demonstrated in our previous submissions and statements that Mexico's decision to limit its investigation to only half of each of the years at issue failed to meet either of these requirements.

10. In its second submission, Mexico claims not to understand our argument that Economía breached WTO rules by only examining injury information for half of the POI (*e.g.,* paras. 33, 48, 49, 53). Its confusion apparently arises from our use of the term "POI" to refer to both the period Economía investigated for dumping, and the period it investigated for injury. We imagine the Panel understood the manner in which we were using the term. Nevertheless, to ensure there is no confusion, the U.S. claim is that Mexico breached Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement because it only examined evidence for half of the injury POI.

11. Mexico also seeks to rebut the U.S. claims by introducing another new table (para. 27). This new table allegedly contains information on imports from the United States to Mexico on a monthly basis from 1997 through 1999. For several reasons, the Panel should disregard

2 *See, e.g.,* Preliminary Determination, para. 66 (Exhibits US-14&15).

Mexico's table, and base its findings instead on the findings and determinations contained in Mexico's published determinations.

12. First, like Mexico's table that allegedly showed production levels in Mexico,[3] the new table does not appear to be record evidence. Mexico has provided no citation to the record for this table, or a photocopy of the page in the record where it is contained. The absence of any citation can be contrasted with the *pedimento* that Mexico discusses in paragraph 164 of its second submission; for that document, Mexico provides a precise record cite.

13. Second, Mexico has failed to identify the source of the data that is contained in the table. We already know from previous stages of this proceeding that Economía lacked accurate data on imports of U.S. long-grain white rice. The petitioners' import data, for example, included unknown quantities of glazed rice and parboiled rice, as well as short-grain rice and medium-grain rice. Thus, if the information in the table is from the petitioners' data, there is no basis to conclude that it accurately reflects the true level of imports of long-grain white rice during the three-year injury POI.

14. Third, Mexico's table directly contradicts Economía's findings in its notice of initiation and preliminary determination that imports were concentrated in the March to August time period.[4] Mexico's complete reversal of its own position serves only to demonstrate that there was no justification for Economía's decision to examine only half of the injury POI.

15. In any event, as we have previously stated, the United States is objecting *per se* to Economía's decision to limit its injury analysis to only half of the injury POI, and not only to the fact that Economía limited its analysis to the period when imports were concentrated. Mexico has conceded that seasonality was not relevant, and it is indisputable that Economía failed to

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3 Mexico's first written submission, para. 60.

4 Notice of Initiation, para. 112 (Exhibits US-1&2); Preliminary Determination, para. 65 (Exhibits US-14&15).

examine at least half of the domestic industry's production over the course of the entire injury POI. Thus, Economía's injury analysis would have been inconsistent with WTO rules even if imports had not been concentrated in the March to August time period. We discussed this issue at length in response to the Panel's questions 6 and 7.[5]

16. Finally, Mexico's argument that there was no "change in structure" during the three-year injury POI, and that it was therefore acceptable to look at a "representative sample" of the data for the entire three years (para. 82), is unfounded. Nothing in Economía's published determinations indicates that it focused on the March to August time period because it believed that period was a "representative sample." Nor are there any findings or evidence demonstrating that the period was, in fact, representative of the year as a whole. Economía's determination must be evaluated on the basis of what it actually said, and not on the basis of what Mexico may wish it had said.

C. Mexico's Conduct of its Injury Analysis Breached Articles 3.1, 3.2, 3.4, 3.5, 6.8, 12.2, and Annex II of the AD Agreement

17. I would like to turn now, briefly, to the breaches relating to the way that Economía conducted its analysis of injury for the data that it did consider. Again, we are focusing our comments on responding to new points that Mexico made in its second submission.

18. First, Mexico responds to our point that Economía could have used the *pedimentos* to separate out imports of long-grain white rice, and to identify contact information for the "known" exporters, by arguing that Economía does not have access to the *pedimentos* (para. 56). In actuality, although Economía may not have possession of the *pedimentos*, it does have access to them. It simply does not request such access, because Economía believes the AD Agreement

5 *See* U.S. Response to Panel Questions 6 and 7, paras. 12-13, 17-20.

does not require it to do so, and because it would take too much time. Mexico made this point in response to the Panel's question 17.

19. Second, Mexico responds to our statement that Economía failed to collect any information after August 1999 by noting that it actually collected information through December 1999 (para. 67). We had based our assertion on Mexico's reply to a question that we asked during consultations. But even if Economía did collect information through December 1999, the fact remains that it did not consider information for any period after August 1999.

20. Third, we noted in our response to the Panel's question 8 that Economía failed to conduct an objective examination of the domestic industry as defined by Article 4.1 of the AD Agreement because it did not examine a consistent set of producers of long-grain white rice when it conducted its injury analysis.[6] Mexico confirms our understanding of the facts, but it justifies Economía's approach on the grounds that not all of the domestic producers provided the requested information. This was the case with respect to production volumes (para. 95(b)), sales (para. 95(c)), installed capacity (para. 95(e)), employment data (para. 95(f)), wages (para. 95(g)), and financial performance (para. 95(h)).

21. Clearly, these reporting failures were not minor. The missing data pertained to many of the most critical factors necessary for Economía's injury analysis. Moreover, while there may truly be times when data is unavailable, Economía's published determinations do not adequately explain why the domestic industry was unable to provide the requested data. Nor is there any indication that Economía took steps to ensure the objectivity of its injury analysis by making further efforts to obtain it. Economía seems to have simply accepted and then used whatever data the domestic industry was willing to provide.

6 U.S. Reply to Panel Question 8, paras. 21-23.

22. Mr. Chairman, Economía's willingness to conduct its injury analysis in this way undermined the objectivity of its injury determination. An objective investigating authority would not permit its domestic producers to control the injury analysis by allowing them to self-select which information they are willing to provide, on a factor-by-factor basis. For in doing so, the authority makes it possible for the domestic industry to influence the outcome of its investigation, by having each individual producer only provide its data for factors that are indicative of injury, while withholding data for factors that are positive. In this way, the domestic industry can ensure that the aggregate data for the "industry" will reflect injury.

23. Mexico also comments on our observations about Economía's analysis of prices, and in particular our observation that Economía made a finding that Covadonga, one of the major Mexican producers, lowered its prices by mixing low-priced imports of long-grain white rice from Argentina with its own production. We also noted that the Argentine imports were priced below the prices of the U.S. imports, and that Covadonga's sales prices showed an increase during the injury POI when its imports from Argentina were excluded from the price calculation.[7] Mexico tries to cast doubt on these findings by stating that Covadonga "apparently" exhibited different behavior (para. 114). But it was Economía itself that made these factual findings.[8] The alleged fall in the domestic industry's prices during the injury POI was one of the primary findings underlying Mexico's affirmative determination of injury,[9] but the record evidence demonstrates that, for at least one major producer, prices actually rose during the injury POI.

24. The next new point in Mexico's second submission is its response to our point that Economía could have obtained information on the "known" exporters by contacting the Rice Federation. Mexico says that if Economía had done so, it would have breached Article 5.5 of the AD Agreement, which requires the authorities to avoid publicizing a petition unless a decision

7 U.S. Response to Panel Question 13, para. 34.

8 *See* Final Determination, paras. 286 and 290 (Exhibits US-6&7).

9 *See* Final Determination, para. 390.

has been made to initiate an investigation (para. 118). But nothing in Article 5.5 prevented Economía from contacting the Rice Federation after it initiated the investigation.

25. Finally, we noted in response to the Panel's question 19 that, contrary to Economía's assertion in its final determination, the dumped imports' share of apparent domestic consumption actually fell during the injury POI. Mexico responds that the dumped imports did increase in absolute terms, and it cites paragraph 244 of the final determination (para. 132). But Mexico is mistaken. As paragraph 244 of the final determination makes clear, the dumped imports actually fell over the course of the entire injury POI: the 1.2 percent increase between March – August 1998 and March – August 1999 was not sufficient to offset the 3.2 percent decrease between March – August 1997 and March – August 1998. Thus, one of the primary factors underlying Economía's affirmative determination of injury was apparently based on a false premise.[10]

D. Mexico's Failure to Exclude Firms with Antidumping Margins of Zero Percent from the Antidumping Measure Is Inconsistent with Article 5.8 of the AD Agreement

26. I would like to move now from Mexico's analysis of injury to the breaches arising from Economía's failure to exclude Farmers Rice and Riceland from the AD measure after it found that neither firm was dumping.

27. Mexico's second submission makes two points on the issue of Article 5.8 of the AD Agreement. Neither has merit.

28. First, Mexico asserts that we have mis-cited the Appellate Body's statement in *United States – Hot-Rolled Steel* that the term "margin" means the individual margin of dumping for each exporter and producer (paras. 135-137). In Mexico's view, what the Appellate Body said was that the term "margins" should reflect a comparison based on an examination of all relevant

10 *See* Final Determination, para. 389.

transactions on the domestic and export markets, and that it should be calculated for each company individually. Frankly, we do not understand Mexico's point. Although Mexico's citation of the relevant sentence is accurate, the fact remains that the preceding sentence states that "'margins' means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product."[11] Thus, our citation of the Appellate Body was accurate.

29. Second, Mexico argues that Article 3.3 of the AD Agreement demonstrates that the Article 5.8 *de minimis* calculation applies to the country as a whole, and not to individual firms. But Article 3.3 has nothing to do with the dumping determination. Article 3.3 is an injury provision that uses the definition of *de minimis* in Article 5.8 as a means to establish a threshold for determining which countries may be cumulated for injury purposes. The cumulation analysis is country-wide by its very nature.

30. Moreover, Article 5.8 itself states that the margin of dumping is to be considered *de minimis* if the margin is less than 2 percent, "expressed as a percentage of the export price." Export prices are inherently firm-specific, not country-wide. If the drafters had intended to require termination only if the weighted average margin of dumping for all of the investigated firms was *de minimis*, they could have said so. This is exactly what they did in Article 9.4 of the AD Agreement, which specifically requires authorities to calculate the all other's rate on the basis of the "weighted average margin of dumping" calculated for the selected exporters and producers. Mexico is trying to read words into the text that are not there.

31. Finally, as the United States has previously stated, if a company is investigated and found not to be dumping, there is simply no basis under Article 1 of the AD Agreement to apply the measure to that firm.

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11 *United States – Hot-Rolled Steel AB*, para. 118.

E. Mexico Breached Numerous Provisions of the AD Agreement and the GATT 1994 by Applying an Adverse "Facts Available" Dumping Margin to Producers Rice and to U.S. Producers and Exporters that It Did Not Examine

32. The fifth issue in this case involves Mexico's decision to only investigate the two exporters that the petitioner named in the petition and two other firms that came forward on their own, and to apply an adverse, facts-available based margin to Producers Rice and every other exporter and producer in the United States.

33. We have discussed this issue in detail in our previous submissions and statements. Once again, I will focus on the new points that Mexico made in its second submission.

34. Mr. Chairman, after two submissions, a panel meeting, and responses to a detailed set of Panel questions, Mexico's arguments on this issue continue to ignore that Articles 6.1 and 6.8 of the AD Agreement, and paragraph 1 of Annex II, prohibit an authority from applying a margin based on the facts available to an exporter or producer that was never even sent the questionnaire and asked to respond.

35. Mexico makes two substantive responses to this point in its second submission. Neither has merit.

36. First, Mexico argues that a Member is only required to apply a neutral margin calculated in accordance with Article 9.4 of the AD Agreement when it has investigated a sample of exporters and producers (paras. 153-155). In Mexico's view, Economía did not sample, so it is under no obligation to apply a neutral margin to the unexamined firms.

37. But Mexico continues to miss a key point: in addition to the obligations of Articles 6.10 and 9.4 of the AD Agreement, Articles 6.1 and 6.8, and paragraph 1 of Annex II, contain an independent set of obligations that a Member must always observe when it bases margins on the

facts available, whether or not it examines a sample of exporters and producers under Article 6.10. And one of the key obligations is that an authority that includes a particular exporter "in an anti-dumping investigation" must give notice to that individual exporter, by sending the exporter a copy of the questionnaire, asking it to respond, and ensuring that the exporter understands that a failure to respond may result in the application of a margin based on the facts available. As the Appellate Body stated in *United States – Japan Sunset*, the obligations in Article 6 of the AD Agreement serve to protect the interests of individual exporters and producers, throughout the antidumping proceeding.[12] If an authority fails to take these steps with respect to an individual exporter or producer, then it cannot apply a margin based on the facts available.

38. Mexico's second substantive response on this point is to argue that it met the notice requirements of paragraph 1 of Annex II by sending its questionnaire to Producers Rice and Riceland, as well as to the U.S. Embassy (para. 188). But this is not enough. The AD Agreement does not permit an investigating authority to shift the burden for providing the requisite notice to the foreign respondents, or the foreign government. Economía did not send its questionnaire to the uninvestigated exporters and producers; therefore, it cannot apply facts available-based margins to them.

39. Turning back to Articles 6.10 and 9.4 of the AD Agreement, we discussed in our second submission why it was neither objective nor unbiased for Economía to limit its investigation by only sending its questionnaire to the exporters and producers that the petitioners identified as such in the petition, and by not sending the questionnaire to the Rice Company, or to the exporters and producers identified in the *pedimentos,* or to the exporters or producers identified in public sources, such as the *Rice Journal*. Mexico argues in its second submission that none of these omissions constituted a "limitation" of its investigation, because Article 6.10 only provides a single basis for limiting an investigation – that is, where the number of exporters or producers is too large (para. 159). But Mexico is only half right.

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12 *United States – Japan Sunset AB*, para. 152.

40. The United States agrees that the only permissible basis for limiting an investigation is where the number of exporters and producers is so large that calculating individual margins would be impracticable. But Economía limited its investigation in an impermissible way, by remaining passive and taking no steps to conduct a proper examination of all of the known exporters and producers of long grain white rice in the United States, or an examination of a representative sample, or the largest percentage of the exporters who could reasonably be investigated. An authority cannot avoid the obligations of Articles 6.10 and 9.4 of the AD Agreement – or free itself of the constraints that the AD Agreement places on the application of the facts available – by ignoring the requirement to conduct a proper investigation.

41. Mr. Chairman, there are only a few more points that I would like to make in response to Mexico's comments on this issue. First, Mexico responds to our demonstration that the petition margin was adverse by arguing that the petitioners did not inform it that the petition overstated the normal value, and thus overstated the dumping margin (para. 168). But the petitioners' silence on this point does not excuse Economía from its obligation to examine the accuracy of the information, as Articles 5.3 and 6.6 of the AD Agreement require, or its obligation to check the information in the petition against other independent sources, as paragraph 7 of Annex II of the AD Agreement requires. Nor does it change the fact that the petition margin was adverse.

42. Second, Mexico disputes our statement that Economía required exporters and producers wishing to obtain a copy of the questionnaire to appear at Economía's offices in Mexico City (paras. 182-84). Mexico says the questionnaire is available on Economía's web site. On this point, we simply refer the Panel to Economía's notice of initiation, which says nothing about the Internet, and confirms our statement.[13]

13 *See* Notice of Initiation, para. 153 (Exhibits US-1&2).

43. Finally, I would like to briefly address our claim that Economía breached Articles 6.2 and 6.4 of the AD Agreement by failing to provide the U.S. respondents the *listado* data that it shared with its domestic industry. Mexico argues in its second submission that the *pedimento* referenced in paragraph 42 of Economía's final determination is on the confidential record of the investigation (para. 165(c)). Our claim is not with respect to that *pedimento*, however; we are contesting the failure to disclose the information from the *listados* that the petitioners used for the export price in the petition. But as this case has progressed, it has become apparent to us that we misunderstood the nature of the data taken from the *listados*. We had assumed that it was public information, because Mexico shared it with its domestic industry. But we now believe it must be confidential information, like the *pedimentos* themselves. The United States does not believe that Articles 6.2 and 6.4 of the AD Agreement require a Member to disclose confidential information to interested parties in antidumping investigations. On the other hand, if the data is confidential, we do not understand how Mexico justifies sharing it with its domestic industry in the first place.

F. Claims Regarding the FTA and Article 366 of the FCCP

44. I will turn now to our claims addressing various provisions of Mexico's Foreign Trade Act, and its Federal Code of Civil Procedure. As with the previous issues, we will not repeat our previous arguments in detail; rather, we will comment briefly on the new points that Mexico made in its second submission.

A. Article 53 of the FTA

45. Turning first to Article 53 of the FTA, Mexico has confirmed that Article 53 precludes Economía from providing exporters and producers who are not initially sent the questionnaire the full 30 day response time that Article 6.1.1 of the AD Agreement and 12.1.1 of the SCM Agreement require it to provide (paras. 189-90). Mexico says it would be illogical to provide such parties a full 30 days. Mexico's interpretation is mistaken. The proper interpretation of the

relevant WTO provisions is that any producer or exporter who receives the questionnaire is entitled to have 30 days to reply, and that the 30 days are counted from the date of receipt, not from the date the questionnaire is sent. Therefore, Article 53 of the FTA breaches WTO rules.

B. Article 64 of the FTA

46. Turning next to Article 64 of the FTA, Mexico confirms in its second submission that Article 64 requires Economía to apply the facts available to exporters and producers that have no shipments during the POI, as well as to those that are not individually investigated and sent the questionnaire (para. 198(d)). In fact, Article 64 requires Mexico to apply the highest level of facts available to such firms. These facts are beyond dispute.

47. Mexico also argues in its second submission that we have not explained why Article 64 is inconsistent with Article 6.1 of the AD Agreement (para. 200). Mexico is mistaken. As we explained at the first Panel meeting, Article 64 is inconsistent with Article 6.1 of the AD Agreement for the same reason that Economía's application of the facts available to the uninvestigated exporters and producers in the rice investigation was inconsistent with that provision.[14] Article 64 requires Economía to apply the highest facts available to firms that do not "appear" in the investigation, even when Economía has not complied with the notice requirements in Article 6.1 (or those in paragraph 1 of Annex II).

48. Finally, Mexico replies to our claim that Article 64 breaches Article 9.4 of the AD Agreement by arguing that Article 9.4 only applies when an authority investigates a sample of exporters or producers (paras. 205-208). But by its plain terms, Article 64 always requires Economía to apply the highest level of facts available to exporters and producers that have no exports during the POI or that do not "appear" in its investigations. Therefore, even if Economía were to overtly limit its investigation in accordance with Article 6.10, so that Article 9.4 would

14 *See* U.S. Oral Statement at the First Panel Meeting, paras. 46, 69.

unquestionably apply, Article 64 would still require it to apply the highest facts available to those producers and exporters. This breaches Article 9.4, because that Article requires an authority that has limited its investigation to apply the neutral margin to all of the exporters or producers that are not included in the examination, without exception.

C. Articles 68 and 89D of the FTA

49. Turning next to Articles 68 and 89D of the FTA, Mexico argues that it is both "natural and logical" to require an exporter seeking a review to have a representative amount of sales, because the authority would not otherwise be able to make a proper price comparison (para. 231). Mexico's assertion is without merit. A small number of export sales, even the sale of a single unit, as long as it is a bona fide sale, is not an obstacle to calculating a margin. Mexico has pointed to nothing in the AD Agreement that would prevent such a comparison.

50. Furthermore, Mexico continues to argue in its second submission that neither Article 68 nor Article 89D requires an exporter to demonstrate that its volume of exports was "representative" as a condition for the initiation of a review (paras. 219, 231). It concedes, however, that a party must demonstrate a representative volume of sales to obtain an individual margin of dumping or subsidization under Article 89D (para. 231). In addition, the United States supplied evidence in response to the Panel's question 31 which confirmed that Mexico requires firms seeking reviews under Article 68 to demonstrate a representative volume of sales.[15]

51. Therefore, whether one characterizes it as a requirement to initiate a review of the margin, or a requirement to conduct a review of the margin, or a requirement to obtain a new individual margin, the fact remains that Articles 68 and 89D require exporters and producers to demonstrate a representative volume of sales in order to change the level of duties levied against them. The AD and SCM Agreements do not permit authorities to impose such a condition.

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15 *See* U.S. Response to Panel Question 31, paras. 76-81.

D. Article 93V of the FTA

52. The fifth statutory provision at issue is Article 93V, which requires Mexico to impose fines on importers that import certain goods subject to an AD or CVD investigation.

53. I have only a few points to add to our previous arguments about the scope and meaning of Article 93V.

54. First, it is worth mentioning again that Mexico has made absolutely no effort in its second submission or any previous submission or statement to contest our demonstration that Article 93V is (1) "specific" to dumping or subsidization; (2) "against" dumping or subsidization; and (3) not "in accordance with the provisions of GATT 1994," as interpreted by the AD and SCM Agreements. Mexico's citation to Article 2 of its Foreign Trade Act appears to be an implicit admission that Article 93V is an impermissible non-duty remedy to dumping (para. 234).

55. Second, Mexico argues in its second submission that Article 93V is discretionary, because Economía allegedly has discretion to decide in a particular case whether the conditions for imposing a fine are met (para. 237). But if Economía finds the conditions are met, it must impose a fine. Therefore, the provision is not discretionary.

56. Third, Mexico argues that Article 93V is discretionary because it merely states that it "shall be the responsibility" of Economía to punish the infringing activity. This is equivalent to saying that the law is discretionary because Economía may simply choose not to enforce it. As the panel stated in *United States – Alcoholic Beverages*, the non-enforcement of a provision that mandates WTO-inconsistent action does not make the provision itself discretionary.[16] If it is

16 Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted June 19, 1992, BISD 39S/206, para. 5.39.

Economía's responsibility to punish these activities, then Economía has an obligation to do so, and any decision on its part not to fulfill its responsibility does not excuse the WTO breach.

E. Article 366 of the FCCP and Articles 68 and 97 of the FTA

57. The final set of Mexico's legal provisions at issue are Article 366 of the FCCP, and Articles 68 and 97 of the FTA. Once again, I have only a few points on these provisions, other than those that we have already made in our previous submissions and statements.

58. First, with respect to Article 366 of the FCCP, Mexico has repeatedly argued that the provision does not directly apply to the subject matter or procedures of the Foreign Trade Act (para. 238). It is unclear what Mexico means when it says Article 366 is not directly applicable. Mexico seems to be implying that the provision is indirectly applicable to these matters. If this were not the case, Mexico would not have found it necessary to qualify its response in this way. It is also telling that Mexico has made no effort to explain why Article 366 does not apply, directly or indirectly, to the Foreign Trade Act.

59. Turning next to Articles 68 and 97 of the FTA, Mexico appears in its second submission to be distinguishing between duties that are "definitive" and duties that are "binding" (paras. 243 and 244), and it seems now to accept that a Member imposes "definitive duties" at the time that it issues the final determination, even if the duties themselves are not yet "binding" (*see id.*). But Articles 11.2 of the AD Agreement and 21.2 of the SCM Agreement state that Members "shall" review the need for the continued imposition of the duty, "upon request," if a reasonable period of time has elapsed since the "imposition" of the "definitive duty." Viewed in context, the term "imposition of the definitive duty" refers to the imposition of the AD or CVD measure itself, and not to the levying of duties under the measure. This can be seen, for example, in Article 11.1 of the AD Agreement, which refers to the "anti-dumping duty" remaining in force.

60. Neither Article 11.2 of the AD Agreement nor Article 21.2 of the SCM Agreement permits an authority that has imposed an AD or CVD measure to refuse a review on the grounds that the measure is not "binding" until the end of judicial review. Therefore, by requiring Economía to deny reviews on such grounds, Articles 68 and 97 of the FTA are inconsistent as such with Article 11.2 of the AD Agreement, and Article 21.2 of the SCM Agreement.

61. Turning to our claim that Articles 68 and 97 breach Articles 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement, Mexico appears to be arguing that Articles 68 and 97 do not preclude either type of expedited review. As we stated during the first Panel meeting, we are confused by Mexico's statement, because Mexico stated during consultations that those Articles did preclude such reviews. In fact, Mexico stated that the only reviews that Articles 68 and 97 do not preclude are anti-circumvention reviews. Moreover, Article 89D of the FTA only permits an exporter to request a review if the good in question is subject to a "final" duty. But under Article 97 of the FTA, only determinations issued at the end of a judicial proceeding can be considered "final." Therefore, Article 97 does preclude expedited reviews, and it is, therefore, inconsistent as such with Article 9.5 of the AD Agreement, and Article 19.3 of the SCM Agreement.

62. Finally, Mexico argues that it safeguards the interests of the parties involved in a judicial review of an AD or CVD measure by allowing them to post bond, rather than pay the duties upon entry, while the judicial review is ongoing (para. 242). But the AD and SCM Agreements do not require parties to choose between seeking judicial review and seeking an administrative review; they are entitled to both. Furthermore, Mexico refuses to conduct administrative reviews requested by any party, as long as even one party is challenging the measure.[17] The firms that are not involved in the judicial review are particularly disadvantaged – they are not parties to the litigation, so the outcome of the case will not affect their AD or CVD margins. Nevertheless, they are denied the opportunity to obtain a review, and thus an opportunity to reduce their margins, for the duration of the litigation.

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17 *See, e.g.*, Mexico's First Written Submission, para. 302.

G. Conclusion

63. Mr. Chairman, I have two final points that relate to the way that Mexico has chosen to present its defense in this dispute.

64. The first of these points relates to Mexico's repeated efforts to convince the Panel to disregard whole portions of the U.S. claims and arguments in this dispute. Initially, Mexico based its request on the assertion that the United States was making arguments that were not included in our consultation request or panel request. As we explained in our response to Mexico's preliminary ruling request, Mexico is confusing claims – which must be included in the panel request – and arguments, which need not be.

65. Now, in its second submission, Mexico has made the additional argument that the Panel should disregard any U.S. claims or arguments that do not appear in our first written submission. The Panel should reject this request as well. Nothing in the DSU suggests that a Party's first written submission defines the scope of permissible claims and arguments that a Party may raise over the course of a dispute. On the contrary, as the Appellate Body found in *EC – Bananas*:

> There is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel. It is the panel's terms of reference, governed by Article 7 of the DSU, which set out the claims of the complaining parties relating to the matter referred to the DSB.[18]

18 Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted September 25, 1997, para. 145 ("*EC – Bananas AB*").

66. All of the claims that we have raised in this dispute were in our panel request. For example, Mexico today claimed that the United States failed to include a claim under Article 6.1 regarding Article 64 of the FTA. If the Panel refers to the U.S. panel request at section 2(b), however, it will see that we did make an Article 6.1 claim with respect to Article 64 of the FTA. Paragraph 2(b) states, "Article 64 of the Foreign Trade Act codifies the 'facts available' approach that Mexico applied in the rice investigation . . . . This provision appears to be inconsistent with Articles 6.1. . ." So, Mexico's claim that we did not set forth certain claims in our request is wrong. Therefore, the United States respectfully requests that the Panel focus its attention on the parties' substantive arguments, and not on Mexico's efforts to shield those arguments from consideration.

67. Finally, Mr. Chairman, the United States feels compelled to comment on language that Mexico unfortunately chose to employ in its second written submission and the allegations of bad faith that Mexico made today. For example, Mexico uses terms like "scandalous," "deceitful," and "clumsy," and it has said that the United States is trying to mislead the Panel. Of course this is inaccurate, as even a cursory review of the U.S. presentations demonstrates. (And in this respect I am gratified by the response of the Chair regarding the U.S. answers to Panel questions directed to Mexico. The last sentence of the second paragraph of the cover letter conveying the Panel's questions states, "Each party is free to respond to or comment on questions posed by the other party." Therefore, there are no grounds for Mexico to argue that the United States acted in bad faith by answering questions directed to Mexico.) But, that is not why I am raising this matter today. Rather, the U.S. concern is with the use by one sovereign nation of derogatory language towards another sovereign nation. Language like this is completely inappropriate and has no place in WTO dispute settlement proceedings, as has been recognized in the past by panels and members of the Appellate Body. The United States deeply regrets that Mexico chose to resort to the words that it did.

68. This concludes the oral statement of the United States. Thank you for your attention. We would be pleased to receive any questions you may have.